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‘Rights-Based’ and ‘Children and Young People First’ Approaches to Youth Justice

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Introduction

The Committee on the Rights of the Child (see CRC, 2007) monitors the extent to which youth justice systems across the world comply with the principles laid out in the *1989 United Nations Convention on the Rights of the Child* (United Nations General Assembly, 1989). This chapter will explore the extent to which youth justice in England and Wales¹ protects the rights and wellbeing of children in conflict with the law in compliance with the Convention. The first part of this chapter outlines the key features of International and European children's rights standards as they apply to youth justice. The second part begins with a brief history of youth justice in England and Wales since the United Kingdom (UK) became a signatory to the Convention in 1991. Throughout this period right up to the most recent report published in 2016, the CRC has been highly critical of the youth justice system in England and Wales for its failure to adequately safeguard the rights and wellbeing of young people who offend.

The third part of this chapter will focus on the dramatic changes that have taken place in recent years in policy and practice directed at young people who offend. This is reflected in a significant drop in ‘first time entrants’ (FTEs)² to the youth justice system and the numbers sentenced to youth custody. In response to these changes and reductions in public spending brought about by the financial crisis, the delivery of services to young people who offend have been restructured. Research shows that three main models have emerged, that is ‘offender management’, ‘targeted specialist intervention’ and ‘children and young people first’ (Smith and Gray, 2018). This section will compare and contrast the key characteristics of each of these models before going on to consider whether or not they offer a more rights compliant approach to youth justice, and therefore move closer to the principles of the Convention.

¹ The CRC reports cover the whole of the United Kingdom which includes Scotland and Northern Ireland. Although the broader criticisms of the CRC apply to all four countries in the UK, the legislation in each is slightly different and therefore for the purposes of clarity and length the chapter will only focus on England and Wales.

² That is those young people receiving a formal caution or court disposal for the first time.

The final part of this chapter will focus specifically on youth offending services that follow a 'children and young people first' (CYPF) model. Such services claim to pursue a distinctly different, 'child-friendly' and progressive attitude to youth justice which is explicitly guided by the 1989 Convention. In this section it will be argued that while youth justice agencies which adopt a CYPF approach do indeed offer a more rights-compliant approach, the extent to which such agencies fully uphold the principles of the Convention in the sense of addressing young people's social welfare rights based on social justice principles is questionable.

1. International and European Children's Rights Standards

The *1989 United Nations Convention on the Rights of the Child* (United Nations General Assembly, 1989) sets out the basic principles or standards which are expected to act as benchmarks to assess the extent to which youth justice systems in countries throughout the world protect and promote young people's human rights and 'best interests'. The Convention defines a child as a person below the age of 18 years, and in this chapter the words child and young person will be used interchangeably to describe this age group. The Convention is supported by a number of other international human rights instruments which specifically apply to young people in conflict with the law. The most significant of these are the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (United Nations, 1985: the 'Beijing Rules') the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (United Nations, 1990a: the 'Havana Rules'), and the *United Nations Guidelines for the Prevention of Juvenile Delinquency* (United Nations, 1990b: the 'Riyadh Guidelines').

The Committee on the Rights of the Child (see CRC, 2007) is charged with the task of monitoring how countries are implementing the Convention. All countries that have signed up to the Convention are periodically subject to review, and the reports are open to public scrutiny. There are 54 articles in the Convention which draw together children's economic, social, cultural and political rights, but the most important from a youth justice perspective is article 3 which states that 'the best interests of the child shall be a primary consideration' in all proceedings against children in conflict with the law (Goldson and Muncie, 2015: 230). This concept can be interpreted in different ways, but according to the CRC guidelines (2007) which were written to clarify how the principles of the Convention should be applied to youth justice, this is understood to mean that the welfare or wellbeing of the child should be given top priority at all stages of the youth justice process. However, as Muncie (2015:375) argues, while the Convention is 'the most ratified of all international human rights directives.....it is also the most violated'.

The articles of the Convention³ which are considered to be crucial in the context of youth justice state that:

³ The language has been simplified for the purpose of clarity. See United Nations General Assembly 1989.

Article 12 – The right to be heard

‘every child has the right to express his/her views freely, in all matters affecting the child’;

Article 19 – Protection from abuse and violence

‘children should be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation’;

Article 37(a) – Inhumane treatment

‘no child shall be subjected to.....cruel, inhuman or degrading treatment or punishment’;

Article 37(b) – Last resort and shortest time

‘the arrest, detention or imprisonment of a child.....shall be used only as a measure of last resort and for the shortest appropriate period of time’;

Article 37(c) – Humanity, respect and dignity

‘every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age’;

Article 40(i) – Dignity and worth

‘every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth’.

The UNCRC does not explicitly state the minimum age of criminal responsibility (MACR) at which a child who commits an offence can be formally charged and dealt with through criminal procedures. However the CRC (2007) guidelines make clear that an MACR below the age of 12 years is not acceptable by international standards as it fails to take into account the special status of the child by reason of their emotional, mental and intellectual maturity. In England and Wales the age of criminal responsibility is ten years.

In Europe the UNCRC is supported by a number of Council of Europe directives to encourage a more ‘child-friendly’ youth justice. The most important of these are the *European Rules for Juvenile Offenders Subject to Sanctions or Measures* (Council of Europe, 2009) and the *Guidelines for Child-Friendly Justice* (Council of Europe, 2010). The latter expresses a commitment to the idea that young people who offend must be treated as first and foremost children, and that youth justice policies and processes must be child-friendly with the child’s wellbeing, protection and safety as their first priority. The European Commission prioritised child-friendly justice in its 2011 EU Agenda for the Rights of the Child (International Juvenile Justice Observatory, 2017). This reinforced its concern to prioritise the Council of Europe’s Guidelines on child-friendly justice, with a particular emphasis on promoting the child’s right to participation.

Goldson and Muncie (2015: 233) conclude that together the UNCRC and the Council of Europe human rights standards provide ‘a well-established “unifying framework”’

to guide rights-compliant and child-friendly youth justice policy and practice. However, in reality, these standards have simply become moral obligations that 'lack teeth' as they have not been translated into domestic law and so are not legally binding and enforceable.

2. Compliance with International and European Youth Justice Standards

To what extent is youth justice in England and Wales 'child-friendly' and directed at protecting the 'best interests' or wellbeing of the child in compliance with the UNCRC and Council of Europe guidelines? To answer this question it is useful to compare a brief history of youth justice since the beginning of the 1990s with the findings of the periodic reviews that were conducted by the CRC in 2002, 2008 and 2016. Cunneen, Goldson and Russell (2017) argue that there have been three distinct periods in the recent history of juvenile justice, and coincidentally each of them matches the timing of the main CRC periodic reviews (see also Goldson and Muncie, 2012).

The first period between 1991 and 1997 is described by Cunneen, Goldson and Russell (2017: 4) as 'burgeoning punitiveness', when the murder of James Bulger in 1993 acted as a catalyst to politicise youth crime and demonise any young person involved in it no matter how minor the criminal act. This resulted in a rapid increase in the rate of youth custody, which rose by 90% between 1992 and 2002 (Bateman, 2012). Needless to say, the CRC periodic review for 2002 was highly critical of the failure of England and Wales to comply with article 37(b) by ensuring that youth custody was used only as a 'measure of last resort' (United Nations Committee on the Rights of the Child, 2002).

The second period between 1998 and 2008 was marked by the implementation of New Labour's flagship legislation the *1998 Crime and Disorder Act* which led to a complete transformation in youth justice policy and practice. New Labour promised to be 'tough on crime, tough on the causes of crime', but in practice the emphasis was more on the 'consolidation and intensification of punitiveness' (Cunneen, Goldson and Russell, 2017:4) than on addressing the high levels of socio-economic disadvantage experienced by the vast majority of young people who offend (Goldson, 2010). The 'risk factor prevention paradigm' (RFPP) underpinned thinking about youth crime during this period (see Farrington, 2000). This claimed to be able to identify the individual and social factors that increased young people's risk of offending and advocated early intervention to stop offending as quickly as possible (Case and Haines, 2009).

The RFPP was subject to scathing criticism as it emphasised individual risk factors and underplayed social structural constraints such as lack of educational and employment opportunities (Case and Haines, 2009). This resulted in the criminalisation of social need as young people's social welfare difficulties were viewed as pathological, individual deficits in need of correction in order to reduce the risk of offending (Goldson, 2013:123). Overall the individualisation and dematerialisation of young people's welfare needs, the conflation of these needs with

the risk of offending and the focus on early intervention led to net widening and net strengthening. Increasing numbers of young people were drawn into the youth justice system, and subjected to more intrusive forms of correctional intervention. Hence the rapid rise in youth custody continued unabated until the mid 2000s (Goldson, 2010).

The continued failure of the UK to translate the standards of the UNCRC, particularly the principle of safeguarding the child's 'best interests', into youth justice policy and practice was heavily criticised in the 2008 CRC report. The key target of New Labour's youth justice reforms to 'nip offending in the bud' had simply legitimated excessive criminalisation as large numbers of young people who offend were sucked into the youth justice system and hastily driven towards custody. Once again custody was not being used as a 'measure of last resort' and treatment inside custody remained 'degrading and inhumane' (United Nations Committee on the Rights of the Child, 2008).

The final period 2009 to 2016 appears to have been one of 'penal moderation' (Cunneen, Goldson and Russell, 2017: 4). This has been evidenced by a dramatic drop in first time entrants (FTEs), of 83% between March 2006 and March 2016 (Ministry of Justice, 2017). In the same period, there has been an equally significant reduction in the rate of youth custody, falling by 73% (Ministry of Justice, 2017). These changes lead Bateman (2017:4) to talk about the 'shrinkage' or 'slimming down' of youth justice. However, like a number of other critics (Smith, 2014; Kelly and Armitage, 2015), Bateman (2017) challenges the progressiveness of these developments. He argues that they are unlikely to be an informed response to the research evidence on the dangers of criminalising young people by drawing them into the formal youth justice process, and are more likely to be a response to changes in police recording practices, a drop in recorded youth crime and the cuts in public expenditure set in place by the last two governments. Correctional measures, particularly youth custody become expensive policy options in times of austerity.

Research also shows that during this era of 'penal moderation' there has been a more concerted effort to protect the child's 'best interests' or welfare. A number of researchers had noted that a strong undercurrent of welfare was already evident in policy and practice in the earlier period (Field, 2007; Phoenix, 2009), suggesting that Cunneen, Goldson and Russell (2017) may have exaggerated the level of punitiveness in youth justice under New Labour between 1998 and 2008. Since the early 2000s multi-agency youth offending teams in partnership with a range of social service agencies progressively attempted to target young people's complex welfare problems, not just concentrating on their offending. However, overall the research shows that throughout this period the social welfare needs of young people who offend, for example those needs relating to family, education, training and employment, and mental health and wellbeing, were not being adequately met (Soloman and Garside, 2008; Carlile, 2014; Gray, 2016). The reasons for this are complex. The negative impact of the audit and managerialist culture set in place by New Labour created tensions and conflicts over targets between YOTs and their partners in the social welfare sector. More recently these tensions and conflicts have worsened as a result of the public spending cuts imposed by both the Coalition

and Conservative governments. YOT budgets were reduced by more than 25% between 2011 and 2016 (Bateman, 2017).

While recognising some improvements in the last decade, particularly the drop in FTEs and the rate of youth custody, the most recent CRC report (United Nations Committee on the Rights of the Child, 2016) on UK's compliance with the Convention remained critical of its failure to translate key principles into its child care and youth justice policy and practice. Repeating comments from previous reports, the 2016 report again criticised the UK for its low age of criminal responsibility which criminalised young people from an early age and was out of step with acceptable international standards. The rate of custody was still considered to be too high, with custody not being used only as a 'last resort', and involving a disproportionate number of ethnic minority and 'looked after' children. Conditions inside custody remained a source of concern, with the use of painful physical constraints and solitary confinement, and the prevalence of high levels of violence and bullying infringing the child's right to be treated with 'dignity and respect' (article 37c) and not to be subject to 'degrading and inhumane treatment' (article 37a).

However, the core issue which emerged from the 2016 CRC report was the overall failure of the UK government to give sufficient attention to protecting the child's 'best interests' or wellbeing by addressing their welfare needs and social rights. Particular concerns were expressed about the high levels of poverty and homelessness suffered by children from disadvantaged backgrounds. The inequalities in the distribution of resources to meet young people's mental health needs and improve their educational attainment were also noted. This was mainly blamed on public spending cuts which had had a disproportionately unfair and unjust impact on 'children's enjoyment' (United Nations Committee on the Rights of the Child, 2016:3) of their social rights in these areas. This problem was exacerbated by the failure to comply with article 12 by respecting and listening to the views of young people and meaningfully involving them in decision making.

3. The Changing Contours of Youth Justice Services

Drawing on the findings from the most recent CRC report, McAra (2017: 961-962) concludes that there are 'major shortcomings' in the way the youth justice system protects the wellbeing and 'best interests' of the child. While she is willing to concede that the upsurge in diversion is to be commended because it reduces the 'criminogenic effect' of system contact, and that there has been some movement towards improving the child-friendliness of youth justice processes, she feels that not enough is being done in 'tackling poverty and promoting a wide social justice agenda'.

In this section I would like to consider whether there is any likelihood of the development of 'child-friendly' youth justice which protects the child's best interests in accord with the principles of social justice. In response to the significant drop in the number of young people entering the youth justice system and reductions in public spending, the delivery of services to young people who offend have been restructured. Over the last two years I, along with a colleague, have been

conducting research which is mapping and modelling changes in the structure and delivery of youth offending team services, and their implications for policy and practice (Smith and Gray, 2018). Our research suggests that three main models of youth justice are emerging, which we have called ‘offender management’, ‘targeted intervention’ and ‘children and young people first’.

‘Offender management’ teams take a similar approach to young people who offend as appeared in the New Labour era and therefore can be subject to the same criticisms. They focus on managing offending behaviour through the supervision of young offenders on out-of-court and court-ordered disposals. Their core objective is to achieve the three main performance targets of reducing FTEs, reducing the use of custody and reducing reoffending. Although desistance theory and research which stress a more strength based, positive approach to young people’s offending is now in vogue (see HM Inspectorate of Probation, 2016), ‘offender management’ teams continue to draw upon the ‘risk factor prevention paradigm’. This means that the ‘criminalisation of need’ remains as young people’s needs are individualised, and conflated with risks of offending. Overall, while some of these teams have developed some innovative and creative interventions in partnership with a variety of community based social welfare providers, in the main they continue to adopt a risk-orientated, ‘deficit’ mindset which ‘pathologises’ and ‘medicalises’ the problems of young people who offend.

‘Targeted specialist intervention’ teams are guided by the same three performance targets as ‘offender management teams’, and are similarly concerned with young people’s behaviour. However, these teams also tend to take a broader perspective in dealing with young people who offend, and see themselves as part of a set of specialist youth support services, with whom they are frequently co-located, which address different aspects of young people’s social welfare problems. Whilst influenced by the ‘risk factor prevention paradigm’, these teams also tend to take a holistic view of young people’s welfare difficulties.

Youth offending teams that follow a ‘children and young people first’ (CYPF) model pride themselves on pursuing a distinctly different, ‘child-friendly’ and progressive approach to young people who offend, which is explicitly guided by the UNCRC and the Council of Europe guidelines⁴. Young people involved in crime are seen as being first and foremost children and CYPF teams explicitly seek to protect their rights under the Convention. Young people’s problems are viewed holistically such that the dynamic interaction between the psychological and the social is given prominence. Diverting young people from the youth justice system to avoid criminalisation and stigmatisation is prioritised and achieved through close collaboration with the police. Diversion from criminalisation is strengthened by social inclusion or supporting young people who offend to access mainstream, universal social services to which all children are entitled. Overall CYPF teams aim to provide holistic, integrated, universal support or ‘one-stop-shops’ to meet the complex social problems that young people who offend frequently face.

⁴ These teams are informed by the ‘positive youth justice’ movement. See Case and Haines (2015a); Byrne and Case (2016); Case and Haines (2015b); Haines and Case (2015).

4. Whither Social Justice in an Era of 'Children First' Youth Justice?

In recent years CYPF agencies have faced significant budget cuts and have also been subject to performance management and inspection criteria suited mainly to 'offender management' rather than 'children first' criteria (Smith and Gray, 2018). Commendably, despite these obstacles, they have strived to offer a more principled 'child-friendly' service that is non-criminalising and engages collaboratively with all disadvantaged children, not just those who offend (Byrne and Case, 2016; Haines and Case, 2015). Undoubtedly, they provide a positive and benevolent experience of youth justice which is more rights-compliant than the other two models. But, the extent to which such agencies fully uphold the wider principles and spirit of the UNCRC by, as suggested by McAra (2017:962), 'tackling poverty and promoting a wide social justice agenda' is questionable. This failure to work more assertively towards social justice is evidenced by the way CYPF teams assess the problems of young people who offend and the way they interpret 'effective practice'.

CYPF agencies place the spotlight on the child, not their offending, which does avoid 'othering', labelling and criminalisation. The assessment of need is not conflated with risk of offending, as in the RFPP but takes account of the wider contours of the child's 'whole' personal and social situation, and supports access to universal entitlements. Nevertheless, the child's problems still tend to be blamed on individual and family deficits, with social constraints given only limited attention. Hence, while in this process system contact is less damaging and harmful than in 'offender management' type agencies and the impact of social disadvantage is taken into account, it could be argued that from a social justice perspective more could be achieved by fundamentally challenging and tackling structural inequalities.

Similar arguments can be made about the way CYPF agencies understand 'effective practice'. Desistance theory and research is influential in their thinking in this area (HM Inspectorate of Probation, 2016). 'Effective practice' is viewed in terms of building young people's strengths, resilience and motivation rather than being obsessed by deficits and pathologies as in the 'offender management' model. The core principle of 'effective practice' is to divert the young person away from formal processing through the youth justice system into universal provision which should be available to all children. This prevents criminalisation. Restorative type interventions are lauded as yet another fundamental component of 'effective practice'. However, interest in such interventions is not driven by concerns about 'responsibilisation' or holding the young person accountable as in 'offender management' teams. Instead the focus of restorative practice is about 'social inclusion' or supporting young people to be restored into the mainstream of community life, for example, by returning to school or finding employment. Finally, article 12 of the UNCRC which obligates 'giving young people a voice' by engaging them in the change process underlies all aspects of 'effective practice' (United Nations General Assembly, 1989).

Overall the above understanding of 'effective practice' is very narrow, process orientated and avoids facing up to the challenges posed in order to achieve 'just' and 'equitable' outcomes. The achievement of the latter would necessitate a greater commitment to advocacy work and social action to confront the negative effects of socio-economic disadvantage.

Despite the criticisms that can be directed at the limitations of CYPF agencies in the way they assess young people's problems and interpret 'effective practice', there are two aspects of their structure and style of delivery which places them in a strategic position to engage in more progressive forms of practice in the future which better upholds the 'socially just' spirit of the UNCRC. First, guided by their 'child first' principle, they have established partnerships with a wide network of social welfare providers to offer integrated 'one-stop-shop' youth support services with access to universal entitlements. Second, in response to public spending cuts and government demands for greater localisation and flexibility, they have shown themselves to be capable of delivering some innovative and creative intervention packages. Both of these features could readily be adapted to work more stridently towards social justice ideals and equitable outcomes for disadvantaged young people who offend.

Conclusion

Newly emerging agencies such as those inspired by CYPF principles are in a stronger position to adhere to the principles laid out in the UNCRC and Council of Europe guidelines than at any other time in the history of youth justice. This is not simply in the sense of promoting the 'best interests' or 'wellbeing' of the child, but also of, as McAra suggests, moving beyond being 'child-friendly' to achieve outcomes which are socially just and actually confront social disadvantage and structural inequalities. The key question is do these agencies have the desire to move beyond 'talk' to engage in 'social action', or is this to place unrealistic expectations on them at a time when they continue to be funded and inspected according to 'offender management' logic.

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